(including not only differences in statutory language but differences among express, field, and conflict preemption theories) to a wide variety of state laws; as this Court has stated, there are "different approaches ... in various contexts." *Id.*, 529 U.S. at 107-08. But, apart from the petition in this case, no one has ever supposed that such differences in wording rise to the level of a circuit conflict presenting a distinct, important legal issue warranting this Court's review. Tellingly, no judge in any of the cases upon which petitioners rely – and not even the dissent below – has ever suggested that a circuit conflict exists.

3. The decision below is correct. Initially, in describing a "presumption against preemption," Pet. App. 4a, the court of appeals did no more than apply this Court's admonition that "[c]onsideration under the Supremacy Clause *starts with the basic assumption* that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added). This Court has never intimated that the federalism concerns underlying that admonition disappear whenever a preemption case involves the construction of an express statutory preemption provision, especially where, as here, the provision is ambiguous. Nor has this Court (or any other court) held that the kind of state law at issue here falls outside a state's traditional and historic police powers. Indeed, the states' police powers have long been recognized as including both acquiring data from manufacturers about their products, *e.g. Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-32 (1919), and the regulation of electricity and natural gas utilities, *e.g.*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), which in California includes provision of energy efficiency services, *e.g.*, Cal. Pub. Util. Code §§ 399(c)(3), 701.1(a).

In any event, the court of appeals did not rest its ruling on the "presumption against preemption." While the court noted that the presumption supported a narrow reading of § 6297(a)(1), Pet. App. 7a, the court did not end its analysis there. The court went on and independently applied traditional "rules of statutory construction" as it assessed the statutory language, the structure and purpose of the statute as a whole, applicable federal regulations, and the relevant legislative history, ultimately concluding that the California regulations are not preempted. Pet. App. 7a-20a.

Thus in upholding the data-submittal regulations, the lower court relied on the key fact that the term "disclosure of information," in the first paragraph of § 6297(a)(1), is used in other contexts within EPCA where it clearly contemplates *only* disclosures made directly to consumers at the point of sale or use. Pet. App. 7a-8a (citing 42 U.S.C. §§ 6294, 6296(d), 6297(a)(1)(B)). For example, § 6297(a)(1)(B) preempts state regulations that require the "disclosure of information ... other than information required under section 6294...." Such "disclosure of information" is, on the face of § 6294, limited to consumer disclosures at the point of sale or use. § 6294(c)(3) ("displayed in a manner ... likely to assist consumers in making purchasing decisions"), (c)(4) ("displayed or distributed at the point of sale"), (c)(5) ("attach[ed] to ... or ... ship[ped] with the product [to] assist consumers in making purchasing decisions or in using such product").

The court also relied on the fact that both EPCA, and the Federal Trade Commission ("FTC") regulations adopted thereunder, carefully distinguish between consumer disclosures and data-submittal to the government. "When Congress referred to the submittal of data to a

governmental entity in EPCA, it used the phrase 'submit information or reports,' not 'disclosure of information.'" Pet. 8a (citing § 6296(d)). Similarly, "FTC regulations, like EPCA, use 'disclosure' to refer to consumer-directed labeling and 'submission' or 'submit' to refer to data-submittal to the government." Pet. App. 8a n.5 (citing 16 C.F.R. Part 305); *see also* 54 Fed. Reg. 28,031, 28,032-33 (July 5, 1989) (FTC stating, during a rulemaking proceeding, that § 6297(a)(1) "is referring to . . . disclosures on a . . . label, not to information-reporting requirements"). The court further described at length how EPCA's legislative history indicated that Congress intended to preempt state regulations on efficiency standards, testing, and labeling, but not on data-submittal. *Id.* 8a-12a.[6]

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[6] Additional rationales, briefed below, *e.g.*, Appellants' Opening Br. at 21-22, 26-31 & n.8, 2003 WL 23207548 ("App.Op.Br."), but not addressed by the court, support the conclusion that data-submittal is not "disclosure of information." First, under § 6297(a)(1)(A) states may adopt the federal test methods as their own. *Compare* 42 U.S.C. § 6297(a)(1)(A) *with id.* § 6297(b)-(c). Therefore, the California data-submittal requirements are independently valid, because Department of Energy ("DOE") and FTC regulations require manufacturers to submit all data produced during the federal tests upon request, 10 C.F.R. § 430.62(d) (2005); 16 C.F.R. § 305.15(b) (2005) – just as California does, *see* Cal. Code Regs. tit. 20, §§ 1604, 1606 tbl.V; Martin App., *supra* n.3. Second, preemption of data-submittal regulations in § 6297(a)(1) would be inconsistent with § 6297(e) and (f). Those provisions exempt from preemption, and thereby encourage, state procurement standards that are more stringent than federal law and specified types of state building standards, but if states were unable to require manufacturers to submit relevant data, it would be very difficult to implement such standards. Respondents also demonstrated that the data-submittal regulations are not preempted because they do not call for "any measure of energy consumption" that is "other than" what is required under federal law, 42 U.S.C. § 6297(a)(1). App.Op.Br. at 34-42. Finally, respondents showed that the challenged marking regulations do not call for the "disclosure of information" or for "any measure of energy consumption." *Id.* at 44-47.

The court of appeals also correctly upheld the challenged appliance-marking regulations. With regard to the requirement that appliances be marked with the manufacturer's name (or brand name or trademark), the model number, and the date of manufacture, Cal. Code Regs. tit. 20, § 1607(b)-(c), the court stated that because those factors have only an "indirect, remote, and tenuous" relation to "measure[s] of energy consumption," within the meaning of 42 U.S.C. § 6297(a)(1), the regulation is not preempted. Pet. App. 15a-16a. With regard to the requirement that "commercial and industrial equipment" be marked with basic energy performance data, Cal. Code Regs. tit. 20, § 1607(d)(2), the court held that even though the regulation calls for "measure[s] of energy consumption," 42 U.S.C. § 6297(a)(1), it is not preempted, because there are no federal labeling rules for such equipment and therefore the regulation is not "other than" what is required under federal law, within the meaning of § 6297(a)(1)(B). Pet. App. 16a-19a. The court explained that "[w]here [federal law] authorizes the DOE to take action that would preempt inconsistent state regulations, the DOE's inaction, without more, fails to preempt. . . ." Pet. App. 17a-18a; *see also Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 253-54 (3d Cir. 1999); 69 Fed. Reg. 61,916, 61,222 (Oct. 21, 2004) (DOE stating that adoption of test methods, without labeling rules, for commercial and industrial equipment does not preempt state law).

Nothing in *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ("*EMA*"), casts any doubt on the validity of the judgment of the court below or its "interpretive methodology." In *EMA*, this Court ruled that the plain meaning of the word "standard" in Section 209(a) of the federal Clean Air Act, 42 U.S.C. § 7543(a), compelled preemption of a state law requiring operators of fleets of motor vehicles to purchase a specified percentage of low-emission vehicles. That ruling in no way suggests that the

decision below, on a different statute in which an ambiguous multi-word phrase is at issue, is incorrect, nor does it support the propriety of this Court's review. Indeed, just the opposite is true, for in both *EMA* and the instant case, "the 'presumption against preemption' . . . demonstrably makes no difference to the resolution of the principal question. . . ." 541 U.S. at 256; see pp. 8-9 *supra*. Moreover, the *EMA* Court was presented with a situation in which different circuits had interpreted the applicable statute with different results. 541 U.S. at 251 (citing *Ass'n of Automobile Mfrs. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1 (1st Cir. 2000); *American Auto Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998)). Where, as here, no comparable conflict is presented, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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AIR CONDITIONING & REFRIGERATION INSTITUTE *et al.*,
Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF

Petitioners Air-Conditioning and Refrigeration Institute *et al.* submit this Supplemental Brief in response to the Brief for the United States as Amicus Curiae. The United States contends, in sum and in substance, that certiorari should not be granted because the Ninth Circuit's result can be defended on grounds not identified by the court below. From the government's perspective, the Ninth Circuit's badly misconceived method of statutory interpretation—to announce an insupportably broad presumption against preemption; to use that presumption repeatedly to interpret the statutory preemption provision in unduly "narrow" fashion; and on that basis to find no preemption—is beside the point. Accordingly, the government makes no attempt to defend the Ninth Circuit's formulation of the presumption against preemption, nor any serious effort to defend that court's statutory analysis of the preemption provision. And, perhaps most strikingly, the government does not argue that this issue is not important. Rather, it simply takes a different view of certain (but not all) aspects of the merits of the case—a dispute that this Court should properly resolve after full briefing on the merits.

I. THIS CASE CLOSELY RESEMBLES *EMA*.

Before addressing the government's interpretation of 42 U.S.C. §§ 6297 and 6316, it is important first to note the critical issue that the government glosses over—the striking similarity between this case and *Engine Manufacturers Association* v. *South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002), *vacated*, 541 U.S. 246 (2004). The government makes only a passing nod to *EMA*, and simply notes that the two cases involve different statutes. U.S. Br. 14-15. But this observation misses the critical point identified by the dissent below—namely, that the Ninth Circuit's decisions in *EMA* and here are of a piece; on both occasions, that court deployed an exceedingly broad formulation of the presumption against preemption to justify misreading a federal

preemption provision. Pet. 11-14. The government's characterization of the opinion as having "carefully analyzed the relevant [statutory] language," U.S. Br. 15, is wholly belied by the Ninth Circuit's failure to address the plain meaning of the statutory terms, and its dozen assertions that it was construing the preemption provision "narrowly." Pet. 11-12. The decision below is *precisely* like the decision that this Court thoroughly rejected in *EMA*, and this alone merits plenary review.

II. THE GOVERNMENT MISINTERPRETS 42 U.S.C. § 6297.

The bulk of the government's submission is devoted, not to evaluating the importance of the issue presented, nor to the federal interest therein, but to an interpretation of the statutory language that goes far beyond any analysis the Ninth Circuit performed. The government makes no effort to respond to, much less contest, the Petition's showing that the decision below has significant practical repercussions for this federal regulatory regime, for the entities that it regulates, and for federal preemption provisions in general. Pet. 21-25; AAM Br. 15-16. It does not dispute that the California requirement imposes a substantial burden on the regulated industries; that the draconian enforcement mechanism contained in § 1608 effectively ensures that California has won the race to regulate, and so its rule will govern nationwide; and that therefore this issue presents a substantial question of national importance. Pet. 23-24. In short, if the government's interpretation of the statute is mistaken, its argument against certiorari withers away. Indeed, certiorari is warranted if the interpretation of the statute even presents a close question, for that alone demonstrates that the Ninth Circuit's aggressive and mistaken application of a presumption against preemption was decisive in its interpretation of the statute. And, in fact, the government does misinterpret the statute, for the reasons that follow.

1. *Disclosure requirements.* According to the government, CEC's requirement that companies disclose to it the informa-

tion set forth in Cal. Code Regs., tit. 20, § 1606 does not constitute a "disclosure" of information for purposes of 42 U.S.C. § 6297. In interpreting the term "disclosure" in § 6297, however, the government fails even to address its plain meaning. Cf. *United States* v. *Wells*, 519 U.S. 482, 490 (1997) ("We begin with the text."); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989). Of course, in common parlance the word "disclosure" is not limited to "labeling." Pet. 12 (quoting dictionaries); Pet. App. 21a (Noonan, J., dissenting) ("Disclosure to a state agency is as much an opening up to view of the data as a disclosure to consumers would be."). The government instead begins its analysis with § 6297's title, which it admits can only "'aid in resolving an ambiguity,'" U.S. Br. 6, and "cannot control the plain words of the statute," 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:03, at 215 (6th ed. 2000); see *Brotherhood of R.R. Trainmen* v. *Baltimore Ohio R.R.*, 331 U.S. 519, 528 (1947) ("That the [section heading] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact.... [H]eadings and titles are not meant to take the place of the detailed provisions of the text.").

It then puts primary weight on the argument that § 6297(a)(1)(B) cross-references § 6294 (which deals with labeling), and that both sections use variants of the term "disclose." From this, it concludes that the term "disclosure" must relate to labeling. U.S. Br. 7. This argument is mistaken. By its terms, § 6297 preempts certain state-mandated disclosures, unless the disclosures are of information set forth in § 6294. See 42 U.S.C. § 6297(a)(1)(B). But this in no way means that only state *labeling* requirements are preempted. On the contrary, the natural reading of this language is that *all* disclosures are preempted, whether the disclosure is effectuated through labeling or otherwise, with the limited exception of certain specified labeling requirements, which are but one subset of disclosures. Reply 8-9. If Congress intended to preempt only labeling requirements, rather than all disclo-

sures, surely it would have said so. Cf. *Bailey* v. *United States*, 516 U.S. 137, 143 (1980) (if Congress meant the term "use" to mean "possess," "it easily could have so provided").

Nor is the government's interpretation supported by the statute's use of the verb "submit" rather than "disclose" in § 6296, which authorizes the Secretary to require "each manufacturer of a covered product to *submit* information or reports." 42 U.S.C. § 6296(d)(1) (emphasis added). The government says the different terminology means that "submit" refers to disclosures to the government, and "disclose" means disclosures to the public. But the difference between these words does not pertain to *who receives the information*. Rather, Congress used the word "submit" in § 6296—and the words "provide" and "supply" in §§ 6296(a), (b)(2), (b)(4) and (d)(1)—because all three connote the power to require both the production of information and the turning over of that information. Using the verb "disclose," however, would have implied that manufacturers must provide only *preexisting* "information or reports." (Indeed, this is why Congress both empowered the Secretary to compel product testing to generate energy use and efficiency information in § 6293, and then separately authorized the Secretary to prescribe how such testing information could be disclosed in § 6294.) The different terminology, therefore, does not support the lower court's (or the government's) interpretation at all.[1]

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[1] Moreover, even if the term "disclosure" refers only to providing information to assist consumers in making purchasing decisions, the preemption provision still applies. The ultimate point of the state requirements at issue in this case is to provide information about energy use and energy efficiency to assist consumers in making purchasing decisions. That of course is the purpose of federal labeling requirements as well. *See* 42 U.S.C. § 6294(a)(2)(A) (labeling rules not required for certain covered products if FTC determines labels are "not likely to assist consumers in making purchasing decisions"); *id.* § 6294(a)(3). Thus, even if the preemption provision bars only those state regulations that mandate disclosures to consumers, there is no reason to limit preemption to point-of-sale disclosures or disclosures effectuated by means of a label. The federal program is carefully crafted to avoid imposing undue burdens and costs on

The government's remaining arguments concerning the disclosure provision are simply irrelevant. That the States have some role in energy conservation is beside the point; nothing in Petitioners' argument would in any way impede the implementation of building codes, U.S. Br. 8-9, for the statute deals expressly with this problem—it exempts from preemption provisions "contained in" building codes, 42 U.S.C. § 6297(f)(3), which this regulation assuredly is not. Next, the government's interpretation of § 6297 is plainly not "long-standing." U.S. Br. 9. This claim is supported by a single FTC remark, made without analysis, that the Commission at the time euphemistically termed "largely moot." 54 Fed. Reg. 28,032, 28,033 (July 5, 1989); U.S. Br. 10 n.4. This stillborn pronouncement merits no deference whatsoever, and certainly has no "power to persuade." *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). Finally, the government is wrong about the history of § 6297. U.S. Br. 10-11. To be sure, in 1975, § 6297(a)(1) preempted disclosures only when there existed a rule under § 6294. But rules can be, and have been, promulgated under § 6294 that relate to issues other than pure product labeling,[2] and in any event the 1987 revision of § 6297 removed this condition, and thereby strongly indicated

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manufacturers, while ensuring that consumers receive energy use and energy efficiency information that is useful to purchasing decisions. *E.g.*, *id.* § 6293(b)(3) (test procedures must be "reasonabl[e]" and "not ... unduly burdensome"). That careful balance is destroyed if States can mandate different and more burdensome requirements as long as they reach consumers by some means other than a point-of-sale label, such as a state website. Indeed, many products are not purchased on showroom floors, but by builders and architects more likely to consult websites.

[2] The most conspicuous example is 16 C.F.R. part 305 itself, which regulates not only product labels, but also printed matter concerning products, *id.* § 305.1(b), and representations (whether "in writing or in broadcast advertising") concerning energy consumption, cost and efficiency, *id.* § 305.1(d). *See also id.* §§ 305.4(b)(5), 305.14 (catalogs); § 305.4(d)(1)-(2) (broadcast advertisements); *cf.* 52 Fed. Reg. 46,888, 46,894-902 (Dec. 10, 1987) (promulgating regulations pursuant to 42 U.S.C. § 6294).

that, whatever the state of affairs in 1975, § 6297 is not now confined to labeling.

2. *Labeling requirements*. The government next argues that, although § 6297(a)(1) preempts "*any* State regulation insofar as such State regulation provides *at any time* for the disclosure of information *with respect to any* measure of energy consumption ... of any covered product" (emphases added), it does not preempt California's §§ 1607(b) and (c), because the California provisions require disclosure of only "routine product information," U.S. Br. 12. According to the government, the phrase "with respect to any measure of energy consumption" covers only information that has an "inherent connection" to energy consumption. *Id.* But the concept of an *inherent*, or *immediate*, connection to energy consumption appears nowhere in the statute itself, and ignores the obviously expansive scope of this provision, with its repeated reference to "any" and its use of the capacious phrase "with respect to." Pet. 17. The California-mandated disclosures are at the heart of a program that regulates energy consumption; that is a more than sufficient basis for concluding that they fall within the scope of a provision expressly designed to preempt state energy-related labeling requirements. Pet. 17-18; Reply 9. Indeed, the government's argument makes no practical sense. There is no reason that Congress would have preempted only labeling requirements as to information with an "inherent connection" to energy consumption, U.S. Br. 12, but permitted all other regulation. The California requirement demonstrably imposes substantial burdens, Pet. 24, which the government does not dispute, and the entire purpose of the preemption provision was to alleviate this type of product regulation by States. H.R. Rep. No. 100-11, at 19, 24, 28 (1987).

3. *Marking requirements for industrial and commercial equipment*. The government concedes that "[t]here is some force to" Petitioners' argument about California's marking requirements for industrial and commercial equipment. U.S.

Br. 13-14. Given that the federal statute requires *no* comparable information, California's marking requirements certainly require a disclosure of information that is "other than information required under" EPCA. Pet. 19-20; Pet. App. 22a (Noonnan, J., dissenting). The regulation is therefore preempted. The government's sole argument is that certiorari is not warranted, on the theory that there is no conflict of authority and no *current* inconsistency between California's regulations and other States'. U.S. Br. 13-14. This observation seriously underestimates the budens manufacturers have already borne under the California program and the significant risk of additional burdens the Ninth Circuit's ruling creates.

There is nothing to stop any of the other eight States within the Ninth Circuit from imposing additional or even inconsistent labeling requirements, forcing manufacturers to retool and reprogram again. Under the Ninth Circuit's reasoning, moreover, States around the nation can adopt such regulations, and manufacturers can avoid these burdens only if they are able to obtain a stay, create a circuit conflict and then obtain review in this Court. The significant costs and potential confusion of such a patchwork system are precisely what Congress sought to avoid when it implemented a "comprehensive *national* energy policy." S. Conf. Rep. No. 94-516, at 116 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957. The benefits of further "percolation" of the issues in the lower courts cannot justify such burdens, particularly where the Ninth Circui has simply employed the same flawed preemption analysis that this Court only recently rejected in *EMA*.

III. THE PRESUMPTION AGAINST PREEMPTION LIKEWISE MERITS THIS COURT'S REVIEW.

The government's argument concerning the presumption against preemption is most telling for what it does not say—at no point does it defend the Ninth Circuit's extreme formulation of the rule. Pet. App. 4a-5a & n.1. Rather, it makes the very narrow argument that the holding in the decision below